

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

LINDA C. JONES)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 06A-04-001-RFS
)	
BOARD OF ADJUSTMENT OF)	
SUSSEX COUNTY and HOWARD)	
KROUSE and CAROL KROUSE,)	
)	
Defendants.)	

MEMORANDUM OPINION

Upon an Appeal of the Sussex County Board of Adjustment. Reversed.

Submitted: October 20, 2006

Decided: January 26, 2007

Seth Lewis Thompson, Esquire, Hudson Jones Jaywork & Fisher, LLC,
Georgetown, Delaware, Attorney for Plaintiff.

Richard E. Berl, Jr., Esquire, Smith O'Donnell Feinberg & Berl LLP, Georgetown,
Delaware, Attorney for Defendant Sussex County Board of Adjustment.

Howard and Carol Krouse, Pro Se.

STOKES, Judge

STATEMENT OF FACTS

Howard and Carol Krouse are the owners of one acre of land located at 11388 Sussex Highway, Greenwood, Delaware 19950 (hereinafter “Property”). The Property is zoned agricultural/residential. On November 17, 2005, the Krouses applied for a special use exception to operate a commercial dog kennel, and also applied for four variances¹ from the 200-foot setback requirements (collectively referred to as “Application”).

The Krouses purchased the Property in August of 2003. Shortly thereafter, Mr. Krouse built a structure that contained four kennels (hereinafter “Kennel”) for the housing of his personally owned dogs. The Kennel consisted of a two-inch concrete pad, six four-foot-by-four-foot upright posts and a tin roof.² The Krouses’ Application shows that they placed the Kennel forty feet from the rear property line and twenty-five feet from the closest side property line.

On January 9, 2006, a public hearing was held on the Krouses’ Application. At the hearing, Mr. Krouse admitted to having bred and sold dogs on his Property. He asserted, however, that only his personally owned dogs had been bred.³ Once puppies are born, they are kept in the Krouses’ garage. The Krouses advertise for their sale with two newspapers, “The Guide” and “The Delaware State News”. The Krouses also rely on their established reputation to generate sales.

¹ The variances requested were as follows: (1) a sixty-two-foot variance from the front-line setback; (2) a 175-foot variance from the side-line setback; (3) a twenty-nine-foot variance from the side-line setback; and (4) a 160-foot variance from the rear-line setback.

² The structure was built without a building permit.

³ This testimony is in contradiction with Mr. Krouse’s earlier testimony relating to the breeding of his son’s dog.

Mr. Krouse testified that there were five dogs present on his Property at the time of the hearing. Four of the dogs were owned by the Krouses, but the remaining dog was owned by Mr. Krouse's son, William Adkins. Mr. Adkins dog was being held by the Krouses for breeding purposes, and was to remain on the Property for approximately fourteen days.

It is an admitted fact that the Krouses' dogs bark. The frequency of such barking is in dispute. Mr. Krouse asserts that his dogs will bark only when people are around or when wild animals are visible. Ceibert C. Bragg, a neighbor testifying in favor of the Krouse's application, confirmed Mr. Krouse's assertion. Mr. Bragg stated on record that the Krouses' dogs bark "occasionally, not all the time." Mr. Bragg added that he could not hear the dogs barking from inside his home which is located across the Route 13 highway.

Linda King Jones (hereinafter "Appellant") and Mildred Cain, residents of 11366 Sussex Highway, Greenwood, Delaware 19950, testified in opposition to the Krouses' Application. Ms. Jones classified the barking as "constant", and said that it kept her and her son up at night. Ms. Jones also testified that the barking was impairing her son's, as well as her own, health due to lack of sleep and headaches.

After hearing all the testimony, the Sussex County Board of Adjustment (hereinafter "Board") tabled the case until January 23, 2006. When the Board reconvened on January 23, 2006 the Board members voted in favor of a "kennel for breeding dogs and boarding occasionally not to exceed six dogs."

The Board's decision, dated March 7, 2006 (hereinafter "Decision"), makes, in relevant part, the following findings of facts:

1. The Applicant purchased the property three years ago, and built a kennel for his four dogs. Because the dogs are bred, he occasionally has more than the four dog limit, and must therefore hold a special use exception for a commercial dog kennel.
2. The puppies are generally sold after they have reached an appropriate age.
3. The Applicant is unable to work, and breeds dog [sic] to supplement his income.
4. Dogs are kept inside the existing garage except for exercise and when they are shown to prospective purchasers.
5. The kennel is kept in good condition.
6. The Applicant acknowledged that dogs bark when individuals first come to the property, and at wild animals that may be seen on the property, but did not believe the barking to be unreasonable.
7. Seibert [sic] Bragg testified in support of the Application. He pointed out that the Applicant was a good neighbor, and that the dogs bark only when they see other individuals or animals, and then only for a short time.
8. Linda Jones and Mildred Pain [sic] both testified in opposition. Their primary objection was with respect to barking, which keeps them awake. They also testified that as many as 20 dogs have been on the property at one time, and despite a fence, the dogs still bark at them.

The Board granted the [requested] special use exception, finding that it would not affect adversely the use of neighboring and surrounding properties, with a stipulation that no more than six dogs be maintained on the property.

In Re: Howard and Carol Krouse, Case No. 9368-2006 (Mar. 7, 2006). The Board's decision did not discuss the requested variances any further than to say that they were in fact requested.⁴

⁴ Submitted to the Court, along with the Transcript, were three sheets of paper appearing to be the 9th, 10th and 11th pages of the minutes from the Board hearings held on January 9, 2006 and January 23, 2006. The final paragraph, highlighting the Board's old business, states: "[m]otion by Mr. Workman, seconded by Mr. Mills, and carried unanimously that the special use exception *and variances* be granted" This language, granting both the special use exception and the variances, does not appear explicitly in the Board's written Decision, nor does it appear anywhere in the Transcripts provided to this Court.

On April 5, 2006, Appellant filed a Notice of Appeal requesting that this Court overturn the decision of the Board. Title 9, section 6918 of the Delaware Code grants this Court jurisdiction over Appellant's appeal.

STANDARD OF REVIEW

The Delaware Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing court is to determine whether "substantial evidence" exists on the record to support a zoning board's findings of fact and to correct any errors of law. *Hellings v. City of Lewes Bd. of Adjustment*, 1999 Del. LEXIS 235, at *4 (Del. July 19, 1999); *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Holowka v. New Castle County Bd. of Adjustment*, 2003 Del. Super. LEXIS 161, at *11 (Del. Super. Apr. 15, 2003); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. 1986), *app. dismiss.*, 515 A.2d 397 (Del. 1986). Substantial evidence is "more than a scintilla, but less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

"[T]he Court gives great deference to the Board, requiring only 'evidence from which an agency could fairly and reasonably reach the conclusion that it did.'" *Dempsey v. New Castle County Bd. of Adjustment*, 2002 Del. Super. LEXIS 312, at *9 (Del. Super. Apr. 17, 2002). The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings. *Holowka*, 2003 Del. Super. LEXIS 161, at *11. The

appellate court merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d). Application of this standard requires the reviewing court to consider the entire record, to determine whether, on the basis of all the testimony and exhibits before the agency, it fairly and reasonably could have reached the conclusion it did. *Holowka*, 2003 Del. Super. LEXIS 161, at *14. "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable." *Mellow v. New Castle County Bd. of Adjustment*, 565 A.2d 947, 955 (Del. Super. 1988). If the Board's decision is "fairly debatable" then there has been no abuse of discretion. *Id.*

It is well-established that, when making a decision, the "Board must particularize its findings of fact and conclusions of law to enable the Superior Court to perform its function of appellate review." *Mesa Communs. Group, L.L.C. v. Kent County Bd. of Adjustment*, 2000 Del. Super. LEXIS 417, at *9-10 (Del. Super. Oct. 31, 2000). If the record is deficient then the appellate court cannot properly perform its duty and must reverse the board of adjustment's decision. *See Brittingham v. Bd. of Adjustment of Rehoboth Beach*, 2005 Del. Super. LEXIS 18, at *42 (Del. Super. Jan. 14, 2005) ("In Delaware, ... in cases involving Boards of Adjustment, a superior court does not have the freedom to remand the case in order to allow the Board to hold further hearings, to make specific fact findings or to reconstruct the record. Reversal would be the court's only option.")

DISCUSSION

I. Jurisdiction

The Sussex County Board of Adjustment is given the power, upon appeal, to “[h]ear and decide, in accordance with the provisions of any zoning regulation, requests for special exceptions” 9 *Del. C.* § 6917. Section 115-23(A) of the Sussex County Code (hereinafter “Code”) lists “[c]ommercial dog kennels” as a use for which the Board may issue a special use exception. Furthermore, “[i]n granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this chapter [Title 9 Chapter 69] and the zoning ordinance or code.” 9 *Del. C.* § 6917; *see also, Joseph v. Board of Adjustment*, 1996 Del. Super. LEXIS 402 (Del. Super. Sept. 6, 1996) (affirming Board decision where special use exception was granted subject to certain conditions).

A use variance entails a complete departure from the zoning laws regarding acceptable uses. *See Black’s Law Dictionary* 1551 (7th ed. 1999). A special use exception allows for uses “that are considered essential and are not fundamentally incompatible with the original zoning regulations.” *Id.* at 1403. “The Board is empowered in no case ... to grant a variance in the use of land or structures thereon.” 9 *Del. C.* § 6917. Section 115-23 of the Code contains a list of uses that the Sussex County Council has deemed essential and not fundamentally incompatible with the original zoning regulations; among those listed is

“commercial dog kennels”. The Board had jurisdiction to hear the Krouses’ request and also to impose conditions on the granting of such request.

II. **Adequacy of Record**

Appellant contends that the Board’s Decision is insufficient by reason of its failure to address, in detail, the requested variances from the required setbacks.⁵ This Court has reviewed the entire record and agrees with Appellant. The Board did not adequately address the requested variances and failed to create a record sufficient for appellate review.

Delaware courts have repeatedly held that when making a decision, a board of adjustment “must particularize its findings of fact and conclusions of law to enable the Superior Court to perform its function of appellate review.” *See Mesa Communs. Group, L.L.C.*, 2000 Del. Super. LEXIS 417, at *9-10. To meet this burden a Board may not simply make conclusory statements, or transcribe the legal standard of review. The Board must address the specific issues raised at the hearing and apply the law to those uniquely crafted facts.

Section 115-4(B) of the Code defines a commercial dog kennel as: “[t]he keeping of any dog or dogs, regardless of number, for sale, breeding, boarding or treatment purposes, except if an animal hospital, dog beauty parlor or pet shop as permitted by these regulations, or the keeping of five or more dogs, six months or older, for any purpose.” Section 115-

⁵ Appellant relies in part on this Court’s decision in *Nomad Village, Inc. v. Sussex County Bd. of Adjustment*. 1993 Del. Super. LEXIS 321 (Del. Super. Oct. 12, 1993). In *Nomad Village, Inc.*, the Court reversed the Board’s decision which granted less than the requested variance. The Court found that “the Board particularized no reasons for granting the variance other than that there was a history of similar variances for this locality” *Id.* at *10.

20(B)(2) of the Code limits such commercial dog kennels to farms of five acres or more, “provided that any open pens, runs, cages or kennels shall be located *at least 200 feet from any lot lines.*” (emphasis added). The Krouses currently breed and sell dogs on their one acre of land. *See, e.g.*, Transcript at 14, ll. 15-16 (“I’m breeding my dogs.”); *see also*, Transcript at 11, ll. 20-22 (“[A]s soon as they’re born, I advertise with the Guide, and ... the State News”). In order to continue to breed and sell dogs, and in order to house more than four dogs on the Property, the Krouses would need a special use exception. Additionally, the Krouses will need four variances from the required 200-foot setback requirements. The Krouses Application to the Board included a request for a special use exception and four variances.

The Board’s written Decision does not explicitly grant the Krouses’ application for a variance from the setback requirements. Moreover, the Board’s Decision cannot be read as an implicit grant of the requested variances. The Krouses’ Application to the Board was an all or nothing petition to the Board. The matter before the Board involved a single piece of property, and the Application was directed entirely toward the operation of a commercial dog kennel. If the Board’s Decision is to be read as an implicit grant of the requested variances then the Decision would contain only a partial justification for its conclusion. It is beyond the discretion of this Court to remand specific issues for further consideration, and thus the Board’s decision must either stand or fail as a whole. The findings provided in the

written Decision do not provide sufficient information for appellate review of the Board's decision.

The record in this matter is equally deficient. The Court may look to the record as a whole to determine if the Board adequately considered the relevant factors. *Holowka*, 2003 Del. Super. LEXIS 161, at * 14 (The “substantial evidence” standard of review for administrative agency decisions requires the court to “search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.” (quoting *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980))). In so doing, the Court notes multiple instances in the record where the Board acknowledged the Krouses’ request for variances from the relevant setback requirements. *See, e.g.*, Tr. at 3, ll. 14-17 (“Let’s see, you’re requesting – let’s see – one full variance, four variances, five variances for the special use exception for your commercial dog kennel?”); Tr. at 16, ll. 16-18 (“So that’s why he is here, that’s why he is here. He needs a variance and several, and especially an exception.”); Tr. at 17-18 (discussing generally the requested setbacks and current placement of dog kennel). A cursory recognition of the request is, however, as far as the discussion went. The Board failed to address the legal standard for granting an area variance, and further failed to apply the facts to any of the statutorily mandated criteria for granting variances. *See 9 Del. C. § 6917(3)* (The Board may grant a variance in the application of the provisions of the zoning ordinance or code *only* if the five listed findings are made).

CONCLUSION

Considering the foregoing, the Sussex County Board of Adjustment's grant of Howard and Carol Krouse's Application is reversed.

IT IS SO ORDERED.

cc: Prothonotary